COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

**Leonard Nelson**

Petitioner

v. Docket No.: CR-15-10

 Issued: Sep. 15, 2017

**State Board of Retirement**

 Respondent

**Appearance for Petitioner:**

*Pro se*

 22 Hornbeam Avenue

 Falmouth, MA 02540

**Appearance for Respondent:**

 Kathryn Doty, Esq.

 State Board of Retirement

 1 Winter Street

 Boston, MA 02108

**Administrative Magistrate:**

 **Kenneth J. Forton, Esq.**

**SUMMARY OF DECISION**

The decision of the State Board of Retirement is affirmed. Whether or not the Petitioner’s call fire fighter service should be classified in Group 4 is a moot question because he entered service before April 2, 2012, is no longer a public employee, and has not applied to retire yet. G.L. c. 32, § 5(2)(a) requires that members in these circumstances must “be classified based on the position from which the member was last employed.”

**DECISION**

 The Petitioner, Leonard Nelson, filed a timely appeal under G.L. c. 32, § 16(4) of the December 24, 2014 decision of the Respondent, State Board of Retirement, denying his request for Group 4 classification for his call fire fighter service in the Town of Dennis.

 I held a hearing on September 20, 2016 at DALA, 1 Congress Street, 11th Floor, Boston, MA 02114; it was digitally recorded. I admitted seven exhibits into evidence. (Exhibits 1-7.) The Petitioner testified on his own behalf. The Respondent called no witnesses.

 I have marked the Petitioner’s pre-hearing memorandum of law, which I received February 5, 2016, as “A” for identification. I marked the Respondent’s pre-hearing memorandum of law, which I received February 29, 2016 as “B” for identification. I marked the Respondent’s closing memorandum, which I received November 7, 2016 as “C” for identification. The Petitioner did not submit a closing memorandum.

**FINDINGS OF FACT**

 Based on the evidence presented by the parties, I make the following findings of fact:

1. Mr. Leonard E. Nelson, born 1958, worked for the Town of Dennis as a Call Firefighter/EMT from July 1, 1980 to June 11, 1983. He was not a member of a chapter 32 retirement system while he was a call firefighter. (Testimony; Ex. 3.)
2. He began as a full-time fire fighter and EMT for the Town of Harwich on June 12, 1983 and continued through August 8, 1994. He became a member of the Barnstable County Retirement System on June 12, 1983. (Testimony; Ex. 3.)
3. At some time after he became a member of the Barnstable System, Mr. Nelson was credited with two years, eleven months, ten days of service for his work as a call fire fighter. (Ex. 3.)
4. Mr. Nelson left Harwich to teach at George Washington University from August 1994 through September 1995. He kept his contributions on account with the Barnstable system. (Testimony.)
5. Mr. Nelson returned to Harwich as a fire fighter/EMT from September 3, 1995 through June 1, 1996. (Testimony.)
6. Mr. Nelson was hired as a Captain of the Brewster Fire Department on June 2, 1996 and worked in that position through October 11, 2001. He remained a member of the Barnstable County Retirement System. (Ex. 5; Testimony.)
7. Mr. Nelson then left public service and became the Director of the Cape and Islands EMS System. He continued in this position through 2008. (Testimony.)
8. During this time he also worked as a fire fighter instructor at the Barnstable County Fire Academy from March 1, 2006 through May 31, 2006. He received creditable service for this work and made retirement contributions. (Testimony.)
9. Mr. Nelson maintained his membership in the Barnstable County Retirement System by keeping his retirement contributions on account when he left Brewster. (Ex. 5; Testimony.)
10. On or around August 31, 2009, Mr. Nelson started working as an Assistant Professor at Mass Bay Community College, where he taught EMT certification classes, in addition to other emergency medical service courses. He became a member of the State Retirement System when he started this job. (Ex. 5; Testimony.)
11. On August 31, 2009, Mr. Nelson completed a New Member Enrollment Form with the State Board. On the questionnaire, Mr. Nelson indicated that he had been a member of the Barnstable County Retirement System from 1982 to 2001.[[1]](#footnote-1) (Ex. 5.)
12. On November 24, 2010, the Barnstable system transferred Mr. Nelson’s retirement contributions, totaling $57,005.86, to the State Board. The Barnstable system calculated twenty years, two months, nineteen days of creditable service. Neither party disputes the creditable service calculation. (Ex. 3.)
13. In preparation for retirement, Mr. Nelson asked the State Board to classify his various positions in the group classification system in G.L. c. 32, § 3(2)(g). On March 20, 2014, the State Board sent him a group classification questionnaire to fill out. It informed Mr. Nelson that he could pro-rate his group classification by assigning the group classification for each of his prior positions and coming up with a weighted average that would be used in determining his retirement allowance. Mr. Nelson’s other option was to use the group classification from only the last position he held. (Ex. 6.)
14. Because he was planning to retire from his assistant professor position at Mass Bay Community College, which carried a Group 1 classification, and his prior full-time public jobs had all been Group 4, he planned on taking advantage of the group classification pro-rating option. If he had not pro-rated his group classification, he would have been retired from Group 1 and would not have been able to take advantage of his prior Group 4 positions. (Ex. 3.)
15. The employment history on the group classification questionnaire has to be certified by the employer. For his Barnstable County Retirement System jobs, Mr. Nelson obtained a certification from the Barnstable County Retirement Association, dated April 25, 2014, that classified all of his prior service there in Group 4, including his call firefighter service. He attached the certification to the questionnaire and submitted the complete questionnaire on November 20, 2014. (Ex. 3.)
16. A few weeks before then, on November 1, 2014, Mr. Nelson left his position at Mass Bay Community College and started working for a private hospital as a Diagnostic Technician in the Emergency Room. He thus became an inactive member of the State retirement system. (Testimony.)
17. By letter dated December 24, 2014, the State Board notified Mr. Nelson that it approved Group 4 classification for his fire fighter/EMT positions in Harwich from June 12, 1983 through August 8, 1994 and September 3, 1995 through June 1, 1996, and in Brewster from June 2, 1996 through October 11, 2001. (Ex. 4.)
18. By separate letter also dated December 24, 2014, the Board notified Mr. Nelson that it had not approved Group 4 classification for his call fire fighter service in Dennis from July 1, 1980 through June 11, 1983. The Board tabled for further review its decision on Mr. Nelson’s position with Barnstable County as a Firefighter/Instructor from March 1, 2006 through May 31, 2006. This letter was postmarked December 26, 2014. (Exs. 1, 7.)
19. By letter postmarked January 10, 2015, Mr. Nelson appealed the State Board’s decision to DALA. (Ex. 2.)

**CONCLUSION AND ORDER**

 The decision of the State Board of Retirement is affirmed. For the reasons below, Mr. Nelson is not entitled to have his group classification pro-rated under G.L. c. 32, § 5(2)(a). Classification of his call firefighter service is therefore moot.

 The Board challenges the timeliness of Mr. Nelson’s appeal. Appeals from retirement board decision must be made “within fifteen days of notification” of the board’s action or decision. G.L. c. 32, § 16(4). The Board’s decision was postmarked December 26, 2014; Mr. Nelson could have been notified of the Board’s decision no earlier than that. DALA adheres to the “postmark rule” and considers an appeal filed when it is postmarked at a United States Post Office facility. *See, e.g., Fitzmaurice v. State Bd. of Retirement*, CR-11-772, at \*2 (CRAB 2013). Mr. Nelson’s appeal was postmarked January 10, 2015, exactly fifteen days after the earliest date Mr. Nelson could have been notified of the decision. His appeal is therefore timely.

 G.L. c. 32, § 3(2)(g) provides for a system of classification of employees for retirement purposes. Group 1 is considered a “catch all” category, generally applicable to public officials and employees who perform clerical, administrative or technical tasks. *See* *Maddocks v. Contributory Retirement Appeals Bd.*, 369 Mass. 488, 493 (1976). Group 4 includes “members of police and fire departments not classified in Group 1.” G.L. c. 32, § 3(2)(g). Higher group classification results in a higher age factor being applied to the member’s retirement allowance calculation. *See* G.L. c. 32, § 5(2)(a).

 Until 2011, “group classification depended solely on the member’s position at the time of retirement.” *Maddocks*, 369 Mass. at 493-94; *Conte v. State Bd. of Retirement*, CR-10-277, at \*6 (DALA 2012). In 2011, the legislature changed the way that group classification is assigned. *See* Acts 2011, c. 176, § 14. Now, under G.L. c. 32, § 5(2)(a), “[a]ny active member as of April 2, 2012, who has served in more than 1 group may elect to receive a retirement allowance consisting of pro-rated benefits based upon the percentage of total years of service that the member rendered in each group . . . .” If a public employee becomes a member after April 2, 2012, he is required to pro-rate his service. “The pro-rated benefits shall be calculated in a manner prescribed by the commission.” G.L. c. 32, § 5(2)(a). PERAC has explained how to calculate pro-rated benefits in Memorandum #29, 2012.

 Mr. Nelson attempted to take advantage of the pro-rating option on or around March 2014 by asking the State Board to classify his prior positions. The Board asked him to fill out a group classification questionnaire, which required him to submit data from his former employers. In a letter dated April 25, 2014, the Barnstable system informed Mr. Nelson that all of his prior service, including his work as a call firefighter, was Group 4. The State Board rejected Barnstable’s classification of the call firefighter service, concluding that the call firefighter service is not to be counted in making the pro-rating calculation because it was not membership service.

 Now, in its post-hearing brief, the State Board submits that it made a mistake by classifying Mr. Nelson’s prior positions *at all* because, it now contends, he is not entitled to have his service pro-rated because he is not currently a public employee and he has not applied for superannuation retirement. The Board relies on G.L. c. 32, § 5(2)(a), which states: “A member who entered service on or before April 2, 2012 and seeks Group 2 or Group 4 classification and is no longer a public employee at the time of the member’s retirement shall be classified based on the position from which the member was last employed.”

Mr. Nelson’s last day as a public employee was November 1, 2014. He signed his completed group classification questionnaire on November 17, 2014 and it was received by the State Board on November 20, 2014. Mr. Nelson maintains that he applied to retire in March 2014, but it appears that he has confused beginning the group classification process with applying for retirement, which would have required him to file a completed retirement application. There is no retirement application in the record; therefore, I must conclude that Mr. Nelson has not applied to retire yet. The record also makes clear that he left public employment on November 1, 2014 and has not returned to it. Because he entered service before April 2, 2014, is not retired yet, and would therefore retire when he is no longer a public employee, at this time G.L. c. 32, § 5(2)(a) prohibits Mr. Nelson from pro-rating his group classification, and he must instead be classified based on his last public position.[[2]](#footnote-2) In Mr. Nelson’s case, this is assistant professor at Mass Bay Community College, a Group 1 position.

Because Mr. Nelson cannot pro-rate his service, the question of group classification of his call fire fighter service is rendered moot.

 Were Mr. Nelson to re-enter public employment, however, it would be possible for him to again request that the retirement system that pertains to that public employment pro-rate his past service, pursuant to G.L. c. 32, § 5(2)(a).

 Based on the foregoing, the Board’s denial of Mr. Nelson’s request to classify his call firefighter service in Group 4 must be affirmed, albeit for reasons different from those originally asserted by the Board. He must be retired from Group 1 unless he obtains further public employment and retires from that position.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Kenneth J. Forton, Esq.

Administrative Magistrate

DATED: Sep. 15, 2017

1. This appears to be erroneous, as Mr. Nelson became a member of the Barnstable County Retirement System in 1983. [↑](#footnote-ref-1)
2. PERAC does not address this prohibition in its Memorandum #29, 2012. [↑](#footnote-ref-2)